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No. 83-1819

In the Supreme Court of the United States

OCTOBER TERM, 1983

ELISSA MUELLER MILLER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHESTER H. MILLER, DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that their wrongful death actions arising out of the crash into international waters of an airplane on an international flight are not subject to the two-year statute of limitations applicable to admiralty suits.

1. Petitioners' decedents were killed in the crash into international waters of an airplane on a flight from the Bahamas to Florida in 1976. In 1980, petitioners filed separate suits against the United States in the United States District Court for the Southern District of Florida, alleging jurisdiction and a right to recover under the Federal Tort Claims Act, 28 U.S.C. 1346 and 2671 *et seq.*[1] The

[1]Petitioners had earlier brought lawsuits in federal court against the owner of the aircraft and the firm responsible for its upkeep, alleging land-based negligence in the maintenance, storage and repair of the

government moved to dismiss each suit on the grounds that it was based in admiralty[2] and was not filed within the two-year statute of limitations applicable to such suits, 46 U.S.C. 745. Pet. App. A3. The district court granted the motions and the court of appeals affirmed (Pet. Supp. App. A12, A14; Pet. App. A2).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

In *Executive Jet Aviation* v. *City of Cleveland*, 409 U.S. 249 (1972), this Court concluded that, in aviation tort cases, non-statutory admiralty jurisdiction requires that "the wrong bear a significant relationship to traditional maritime activity" (*id.* at 268). In dictum,[3] the Court noted, "[o]f course, under the Death on the High Seas Act, a wrongful-death action arising out of an airplane crash on the high seas beyond a marine league from the shore of a State may

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plane. Petitioner Miller alleged jurisdiction under the Death on the High Seas Act, 46 U.S.C. (& Supp. V) 761 *et seq.* (Civil Action No. 77-8142 (S.D. Fla. May 13, 1977)). Petitioner Lewis alleged jurisdiction under 28 U.S.C. 1333 (providing for exclusive federal admiralty and maritime jurisdiction), stating in paragraph 10 of her complaint that the death "occurred as a result of an activity which bears a significant relationship to traditional maritime activity" (Civil Action No. 77-8217 (S.D. Fla. July 18, 1977)). See Pet. Supp. App. A12, A14.

[2]The Federal Tort Claims Act does not apply to suits in admiralty (28 U.S.C. 2680(d)). Suits against the United States based on the Death on the High Seas Act must allege an independent jurisdictional ground, because that Act does not contain a waiver of sovereign immunity. *Roberts* v. *United States*, 498 F.2d 520, 525 n.8 (9th Cir.), cert. denied, 419 U.S. 1070 (1974). Here, the waiver would have to be found in the Suits in Admiralty Act, 46 U.S.C. (& Supp. V) 741 *et seq.* See generally *Blanco* v. *United States*, 464 F. Supp. 927 (S.D.N.Y. 1979).

[3]In *Executive Jet*, the aircraft crashed into Lake Erie a short distance from the runway. The Death on the High Seas Act does not apply to the Great Lakes or to deaths within one marine league of shore (46 U.S.C. 761, 767).

clearly be brought in a federal admiralty court" (*id.* at 271 n.20). The court of appeals correctly determined that the instant suits were within the admiralty jurisdiction based both on the "significant relationship" test of *Executive Jet* and on the more narrow language of the opinion specifically addressing the statute applicable to crashes, such as this one, into international waters (Pet. App. A9-A10).

Since *Executive Jet* was decided, the courts of appeals have uniformly held that victims of airplane crashes over navigable waters, on journeys that historically could have been made only by sea-going vessels, may invoke the federal admiralty jurisdiction. See *Ledoux* v. *Petroleum Helicopters, Inc.*, 609 F.2d 824 (5th Cir. 1980) (per curiam); *Roberts* v. *United States*, 498 F.2d 520 (9th Cir.), cert. denied, 419 U.S. 1070 (1974); *T.J. Falgout Boats, Inc.* v. *United States*, 508 F.2d 855 (9th Cir. 1974), cert. denied, 421 U.S. 1000 (1975).[4] This Court noted in *Executive Jet* (409 U.S. at 263-264 (footnote omitted)):

> [M]any actions for wrongful death arising out of aircraft crashes into the high seas beyond one marine league from shore have been brought under the Death on the High Seas Act, and federal jurisdiction has consistently been sustained in those cases. Indeed, it

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[4]Accord, *Stoddard* v. *Ling-Temco-Vought, Inc.*, 513 F. Supp. 314 (C.D. Cal. 1980); *Higginbotham* v. *Mobil Oil Corp.*, 357 F. Supp. 1164, 1167 (W.D. La. 1973), aff'd in relevant part and rev'd in part, 545 F.2d 422, 424 n.1 (5th Cir. 1977), rev'd on other grounds, 436 U.S. 618, 619 n.2 (1978). The only decision to the contrary of which we are aware, *American Home Assurance Co.* v. *United States*, 389 F. Supp. 657 (M.D. Pa. 1975), was distinguished by the courts below because it involved transportation between points within the United States (Pet. App. A9 n.*). Moreover, that case did not involve allegations under the Death on the High Seas Act, and so this Court's observations in *Executive Jet*, 409 U.S. at 271 n.20, were inapplicable.

may be considered as settled today that this specific federal statute gives the federal admiralty courts jurisdiction of such wrongful-death actions.

There is no reason for further review of such a settled question by this Court.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
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JUNE 1984

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[5]Petitioners' suggestion that they were led astray by a literal reading of the Death on the High Seas Act (Pet. 10-11) is without substance. Not only did *Executive Jet* clearly state that suits such as these are within the admiralty jurisdiction, but petitioners also filed other lawsuits arising out of this crash, alleging the admiralty jurisdiction that they now claim they could not have foreseen (Pet. Supp. App. A12, A14). See note 1, *supra*. Moreover, their reliance on 1 L. Kriendler, *Aviation Accident Law* § 5.01(3) (1963) at 200-201 (Pet. 11), is misplaced. Section 5.01(3) addresses the foreign country exemption of the Federal Tort Claims Act, 28 U.S.C. 2680(k), not the admiralty exemption, 28 U.S.C. 2680(d). Elsewhere Kriendler expressly states (§ 2.10[b][i]) that, "where death is caused in an airplane accident in or above the high seas it is clear that a cause of action exists in admiralty under the Death on the High Seas Act" (citations omitted). Finally, *Stoddard* v. *Ling-Temco-Vought, Inc.*, 513 F. Supp. 314, 318-319 (C.D. Cal. 1980), expressly rejected the argument that an allegation of land-based negligence takes a case out of the Death on the High Seas Act and makes it cognizable under the Federal Tort Claims Act.